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ENVIRONMENTAL
HEARINGS OFFICE

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, a political
subdivision of the State of Washington,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY AND TOM FITZSIMMONS, its
DIRECTOR,

Respondents.

PCHB NO. _____

NOTICE OF APPEAL OF THE NPDES
AND STATE WASTE DISCHARGE
INDUSTRIAL STORMWATER GENERAL
PERMIT

I. NATURE OF THE ACTION

1.1 Snohomish County, a political subdivision of the State of Washington, hereby provides notice of appeal of "The Industrial Stormwater General Permit, A National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Stormwater Discharges Associated With Industrial Activities" (hereinafter "Industrial Stormwater General Permit" or "Permit") that was issued by the Washington State Department of Ecology on August 21, 2002.

1.2 The Publication Number for the permit is 02-10-044. A copy of the Permit is attached hereto as Exhibit A.

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II. NAME AND ADDRESS OF THE APPELLANT

2.1 For purposes of this appeal, contact information for the County is as follows:

Gary Nelson, Chair
Snohomish County Council
Snohomish County
3000 Rockefeller Avenue, M/S 609
(425) 388-3494

The County is represented in this appeal by the Office of the Prosecuting Attorney. Contact information for co-counsel is as follows:

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III. JURISDICTION

3.1 The Pollution Control Hearings Board has the authority to hear appeals of the requirements of the subject Permit pursuant to RCW 43.21B.110-310 and WAC 371-08-315(2).

IV. GROUND FOR APPEAL

4.1 The Washington State Department of Ecology ("Ecology") erred in issuing the Industrial Stormwater General Permit that requires Snohomish County and other permittees in

1 a manner that is inconsistent with applicable laws and regulations, that exceeds the authority
2 of the department and is otherwise contrary to law including, without limitation, the following
3 specific provisions in the Industrial Stormwater General Permit.

4 **4.2.** The Washington State Department of Ecology ("Ecology") erred in issuing the
5 Industrial Stormwater General Permit that requires Snohomish County, and other permittees,
6 to comply with the provisions of the Department's *2001 Stormwater Management Manual for*
7 *Western Washington*, where such provisions have not been adopted pursuant to rulemaking
8 as required by Chapter 34.05 RCW.

9 **4.3.** Ecology erred in issuing the Industrial Stormwater General Permit that requires
10 Snohomish County, and other permittees, to comply with later-enacted Total Maximum Daily
11 Loads (TMDLs) for 303(d) Listed Water Bodies and other "control plans," as defined in the
12 Permit, without first invoking the provisions of Section G5, Permit Modification and Revocation.
13 This provision violates the reasonableness standard under which Ecology must operate in
14 regulating the industrial activities of Snohomish County and other permittees under this Permit.
15 Such a requirement is further void for vagueness and violative of due process, both facially
16 and as applied to Snohomish County.

17 **4.4.** Ecology erred in establishing the discharge limitation in Section S3(B)(1), setting
18 forth a definition of the term "process wastewater" that is overly broad, unduly burdensome,
19 and violates the rule of reasonableness.

20 **4.5.** Ecology erred in prohibiting illicit discharges in Section S3(B)(2), where Ecology
21 defined "illicit discharges" in Appendix 2 of the Permit to mean, "any discharge that is not
22 composed entirely of stormwater except discharges pursuant to a separate NPDES permit and
23 discharges resulting from fire fighting activities." Such a prohibition is overly broad, exceeds
24 Ecology's authority under the Clean Water Act and state law, and violates the rule of
25 reasonableness.
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V. DESCRIPTION OF THE PERMIT APPEALED

5.1 Snohomish County is a discharger of stormwater from industrial facilities under State and Federal law.

5.2 The Department of Ecology is the agency of the State of Washington that issued the Permit for which review is sought in this matter.

5.3 The terms and conditions of the Industrial Stormwater General Permit provide coverage for and authorize discharges of stormwater from industrial facilities which would otherwise be prohibited by law. A discharge permit is necessary to meet the requirements of the Clean Water Act for discharges to surface water. The Permit specifically seeks to regulate discharges of stormwater to surface water bodies. In addition to the industrial categories listed in the Permit, permit coverage can be required of any facility discharging stormwater that Ecology determines to be a significant contributor of pollutants to waters of the state.

5.4 The Permit conditions the discharge of stormwater to protect the beneficial uses of the receiving water. Permit conditions include a requirement to have a Stormwater Pollution Prevention Plan (SWPP) and Best Management Practices (BMPs) implemented to eliminate or minimize the potential to contaminate stormwater at the industrial facility. Treatment of stormwater before discharge may also be required if source control and the so-called "good housekeeping" BMPs fail to adequately protect stormwater from pollutants.

VI. FACTS

6.1 Procedural History.

On October 4, 2000, Ecology issued the general stormwater permit for industrial activities, which did not expire until November 18, 2005. In establishing the terms of the general permit, Ecology was engaged in implementing the Federal Clean Water Act (CWA), 33 U.S.C. Sections 1251 – 1376, and the Washington State Pollution Control Act, Ch. 90.48 RCW and their accompanying regulations. The 2000 Industrial Permit was reissued without any significant revisions. The reissued permit was appealed in *Puget Soundkeeper Alliance et al., v. Department of Ecology and Association of Washington Business*, PCHB No. 00-174. The parties to the appeal settled based on an agreed upon process to reissue the permit by July 5,

2002. The Permit was issued on August 21, 2002 and is effective on September 20, 2002. The Permit expires on September 20, 2007.

6.2 Prohibited Discharges.

6.2.1 Process Wastewater. The Industrial Stormwater General Permit expressly prohibits, in the absence of coverage under separate permit, the discharge of process wastewater and illicit discharges. "Process wastewater" under the permit means "any water which, during manufacturing or processing comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product. *Stormwater that commingles with process water becomes process water.*" (Emphasis added). This definition is overly broad, unduly burdensome, and unreasonable because, among other things, the definition would prohibit commingled waters (process water and stormwater) where the commingling is not caused by or under the control of the permittee. Furthermore, the definition would prohibit discharges even where the process water constitutes a minuscule amount of the stormwater discharge. Such an interpretation does not further Ecology's regulatory purpose in preventing the discharge of "pollutants" in stormwater associated with industrial activities. As such, Ecology's "commingling" definition is unreasonable.

6.2.2 Illicit Discharges. The term "illicit discharge" is defined to mean "any discharge that is not composed entirely of stormwater except discharges pursuant to a separate NPDES permit and discharges resulting from fire fighting activities." The definition is overly broad and exceeds the authority of the Department of Ecology under both the Clean Water Act and State law because it fails to recognize non-stormwater discharges that are not pollutants.

For example, the Environmental Protection Agency (EPA) has examined a number of non-stormwater discharges and found no basis for their prohibition. (See, Federal Register, Vol. 65, No. 210, Oct. 30, 2000, pages 64759-64760). Given that the State's purpose in regulating industrial stormwater discharges is to prohibit "pollutants," and the EPA has recognized that some discharges do not pollute even when comprised of substances other

1 than stormwater, such an overly expansive definition of the term "illicit discharge" violates the
2 reasonableness standard under which Ecology must administer this Permit.

3 **6.3 TMDLs.** Permittees are required to comply with any applicable Total Maximum
4 Daily Load (TMDL) determination, including those enacted after the issuance of the Permit.
5 The development of TMDLs is a process established by Section 303(d) of the Clean Water
6 Act. 33 U.S.C. Section 1313. Federal law requires states to identify sources of pollution in
7 waters that fail to meet state water quality standards, and to develop Water Cleanup Plans to
8 address those pollutants. The Water Cleanup Plan, or TMDL, establishes limits on pollutants
9 that can be discharged to the water body and still allow state standards can be met. No
10 detailed TMDL implementation plans have been developed for non-point sources in
11 Snohomish County to date. For those TMDLs that have been adopted for point-source
12 discharges, none currently apply to Snohomish County. Accordingly, the provisions of the
13 Permit that require compliance with TMDLs that may be adopted at some point in the future
14 are void for vagueness because Snohomish County and other similarly situated permittees can
15 only guess at what those plans will require.

16 Furthermore, given the 30-day appeal provisions of the Industrial Stormwater General
17 Permit, Snohomish County cannot today determine whether it can comply with a later-enacted
18 TMDL or other control plan, or whether any other legal reason might exist to appeal such a
19 TMDL or control plan. Unless they are added to the permit through the Permit Modification
20 Process set forth in G5 of the Permit, Snohomish County is denied due process of law. The
21 County is required to object now (within 30 days of issuance of the General Permit) to a
22 condition that may become effective later.

23 Finally, requiring the County to comply with later-enacted TMDLs or control plans
24 without the requirement that they become part of the permit through the Permit Modification
25 Process is inherently unreasonable and exceeds the scope of Ecology's authority.
26 Interestingly, the Department of Ecology recognized that this requirement is unreasonable and
27 agreed to implement TMDLs through a permit modification process in its negotiations with
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1 Snohomish County and other municipalities on the renewal of the Phase I Municipal
2 Stormwater General Permit.

3 **6.4 Stormwater Management Manual for Western Washington.** The Permit requires
4 Snohomish County and other permittees to identify and control stormwater pollutant sources
5 from their operations. Dischargers are required to develop and implement technology-based
6 BMPs to reduce pollutants in their stormwater. Preparation of a SWPPP is necessary for each
7 facility covered by the permit. The SWPPP must include:

- 8 • An assessment, inventory and description of existing and potential pollutant sources;
- 9 • A description of BMPs selected to for the covered facilities, including the regulation of
10 peak flows and volume of stormwater, operational source controls, structural source
11 controls, erosion and sediment controls and other BMPs as necessary;
- 12 • A monitoring and reporting plan; and
- 13 • An implementation schedule for the BMPs.

14 Treatment of stormwater before discharge may required if source controls and good
15 housekeeping BMPs don't adequately protect stormwater from pollutants.

16 A key requirement of the SWPPP is the mandatory use of the standards, conditions and
17 technical provisions of the Department of Ecology's Stormwater Management Manual for
18 Western Washington.

19 The *Stormwater Management Manual for Western Washington* (hereinafter "Manual"),
20 was developed by Ecology in 1992 in response to a directive of the Puget Sound Water Quality
21 Management Plan. The Department issued an updated version of the Manual in August, 2001.
22 The Manual consists of five volumes and establishes minimum standards and technical
23 methodologies that must be used to determine surface water runoff and flow rates, and the
24 design, construction and maintenance of facilities. It further establishes source control and
25 treatment BMPs and how they are to be selected, designed, constructed and maintained.

26 The Manual is a rule within the meaning of RCW 34.05.010(16). Snohomish County
27 wrote a letter to the Department of Ecology in 1996, which is attached hereto as Exhibit B,
28 wherein it demanded to know what steps Ecology had taken to properly adopt the 1992
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1 version of the Manual through the statutory rulemaking process. No written response was
2 received. The Department of Ecology has failed to adopt it pursuant to the statutory
3 rulemaking process. The Manual and the rules contained therein are therefore invalid. *Wash.*
4 *Independent Tel. Assn. v. WUTC*, 110 Wn. App. 147, 39 P.3d 342 (2002). Therefore, the
5 Manual cannot be a lawful permit condition until Ecology engages in rulemaking as required by
6 the Administrative Procedures Act.

7 **VII. RELIEF SOUGHT**

8 Based upon the foregoing, Snohomish County respectfully requests that the Board find:

9 **7.1.** That Ecology has failed to follow the required rulemaking procedures prior to
10 requiring compliance with the provisions of the Department's *2001 Stormwater Management*
11 *Manual for Western Washington*, as part of the Industrial Stormwater General Permit. The
12 Stormwater Manual is therefore an invalid permit condition and does not apply to Snohomish
13 County or other covered permittees.

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15 **7.2.** That the Permit conditions requiring compliance with later-enacted Total Maximum
16 Daily Loads (TMDLs) for 303(d) Listed Water Bodies and other "control plans," as defined in
17 the Permit are unreasonable as to Snohomish County and other permittees, void for
18 vagueness, and violate the due process rights of Snohomish County. The conditions are
19 therefore invalid. Such requirements can only become permit conditions upon a proper
20 modification of the Permit pursuant to General Condition No. 5.

21 **7.3.** That the discharge limitation in Section S3(B)(1) of the Permit, setting forth a
22 definition of the term "process wastewater" is unreasonable, overly broad and unduly
23 burdensome and, therefore, invalid as applied to Snohomish County and other permittees.

24 **7.4.** That in prohibiting illicit discharges in Section S3(B)(2) of the Permit, Ecology's
25 definition of the term "illicit discharges" is unreasonable, overly broad and unduly burdensome
26 and, therefore, invalid as applied to Snohomish County and other permittees.

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28 Snohomish County further requests that the Board order such further relief as is just
29 and equitable.

1 Respectfully submitted this 20th day of September, 2002.

2 JAMES H. KRIDER
3 Snohomish County Prosecuting Attorney

4 By: 

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